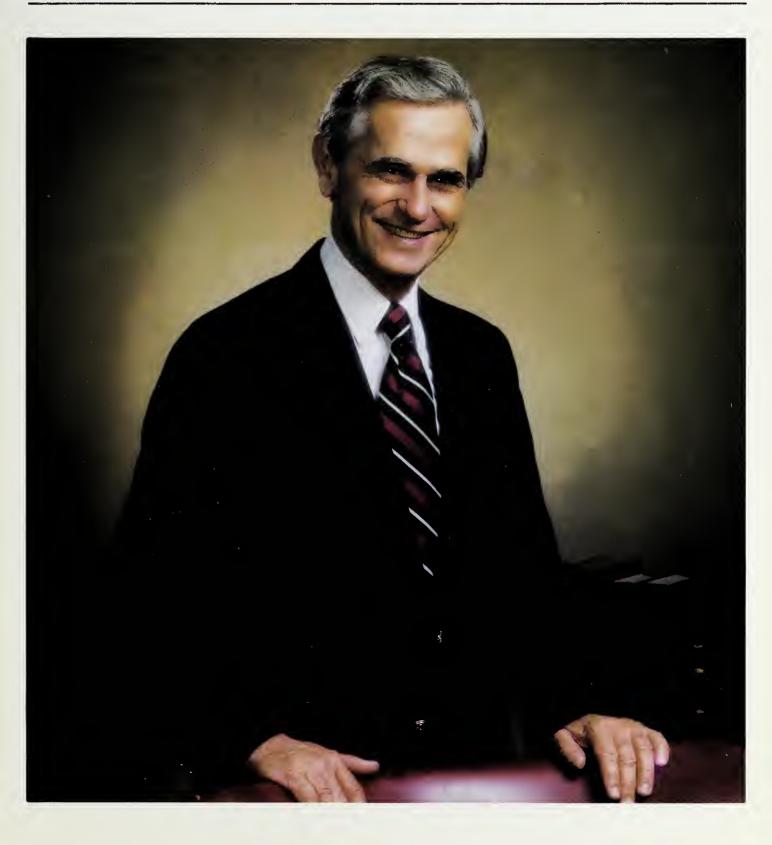
WAKE FOREST

UNIVERSITY

School of Law

Spring/Summer 1989 Volume 19 No. 2



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The Wake Forest Jurist is published twice yearly by the Wake Forest School of Law of Wake Forest University. Its main purpose is to inform the friends and alumni of the Law School about activities and events of interest at the Law School, of recent important decisions by the courts of North Carolina and other jurisdictions, and news of the achievements and activities of fellow alumni. In this way the Jurist seeks to provide a service and a meaningful link between the School of Law and its alumni. Also, the magazine shall provide a forum for the creative talents of students, faculty and its alumni and an opportunity for legal writing by them. Opinions expressed and positions advocated herein are those of the authors and do not represent official policy of the School of Law.

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The JURIST invites all interested students to participate in the Fall/Winter Issue (office located in Room 8).



Pick up your pen and send us your news.

Let us hear from you! Please take time to fill out the enclosed Alumni news form and mail it today.

The Editor's Page

For the first time in its history, the Jurist does not contain a Dean's Column. Associate Dean James Taylor thought that the article on Dean Scarlett contained herein would be a spendid substitute. Instead of having a column by the Dean, we have one about the Dean. I think the purpose is well served. The Dean's Column will return in the fall.

The end of Dean Scarlett's tenure as Dean of the Law School is just one of several changes occurring at Wake Forest. Land is being cleared for the new Professional Center, and plans for the building are starting to take shape. The Professional Center will be one of several new structures on the Reynolda Campus.

The Jurist has also undergone a few changes. I am grateful to everyone who noticed the more modular graphic design of the last issue. The goal is to produce a magazine which not only provides important information, but is also aesthetically pleasing to the read-

ers. I believe that a magazine devoted to professional people should have a professional look. I congratulate the editors who helped accomplish this goal.

I am thankful for all the work which my fine staff of veteran editors has put in this year. Without their efforts, there would be no Jurist.

Our Law School News and Features Editor, Dean Hollandsworth, possesses tremendous creative ability. Dean wrote music reviews for the school newspaper while an undergraduate at UNC-Greensboro. He has worked on school newspapers since the 6th grade, so his experience has been a big help to the staff this year.

Ken Carlson, this year's Alumni News and Features Editor adds a blend of experience and superb writing ability. A former Winston-Salem Journal reporter, he has also done a number of free-lance articles in his spare time.

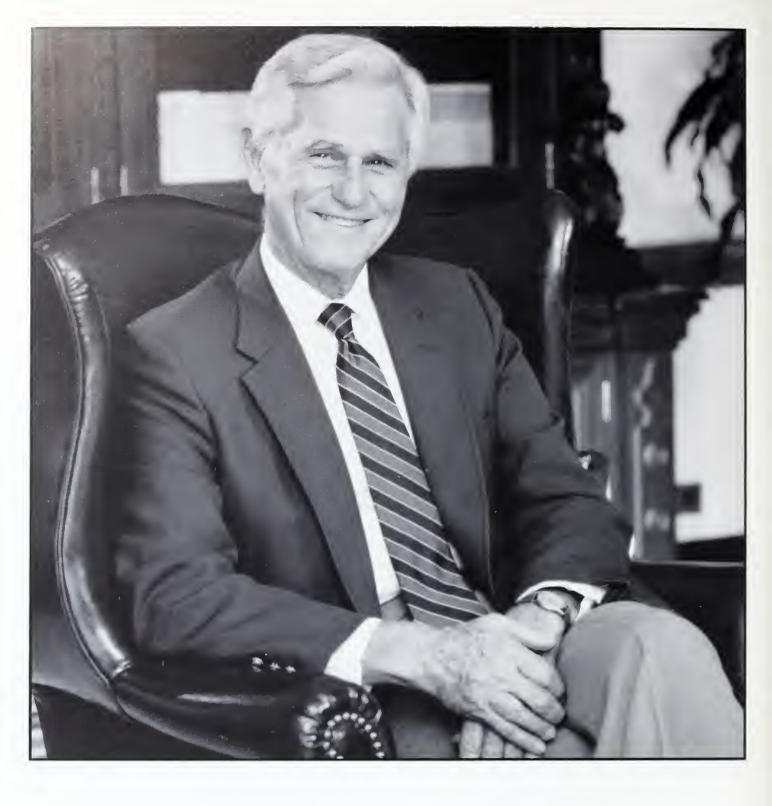
Donna Colberg, Senior Writer and Executive Editor for this year's staff, contributes great talent and a thorough knowledge of the AP Stylebook. While at the University of West Virginia, she worked on an alumni publication, so she knows the focus the Jurist must take.

Steve Dellinger, our Photography Editor for the past two years and my roommate for the past three years, has always been ready with his camera to photograph law school activities. The pictures he takes are as important as any story which gets published. A magazine needs great photographs, and Steve has provided them.

Both Donna and Ken will serve in the capacity of Editor-in-Chief next year. They both have served on the staff for two years and are familiar with the Jurist's format and purpose. I know they will put together a quality magazine, and I am looking forward to receiving my first issue as an alumnus.



The Jurist editorial staff: (L-R) Dean Hollandsworth, Robert Ruegger, Donna Colberg, Ken Carlson, and Steve Dellinger.



John D. Scarlett

A decade of service as Dean of the Law School

JOHN D. SCARLETT. A man who has the unique ability to be a superb teacher as well as administrator.

Dean Scarlett has graced the halls of Carswell Hall for ten years as not just the dean of Wake Forest University School of Law but also as a professor of many courses, including Torts, Constitutional Law, and International Law. His administration will end June 30, 1989, when after serving 27½ years as a dean—more years than any other dean in the country—he retires.

Born and reared in the Pennsylvania Dutch Country of eastern Pennsylvania, Dean Scarlett began creating ties with North Carolina in the 1940s when he attended Catawba College, a small liberal arts college located about 40 miles from Wake Forest, in Salisbury, NC. Midway through his freshman year he left Catawba to serve three years in the Armed Forces during World War II. Dean Scarlett returned to North Carolina after the war and graduated from Catawba with a B.A. in English in 1948. Dean Scarlett made his mark at Catawba College when he was named a regional finalist for the Rhodes Scholarship. He is currently a member of Catawba's Board of Trus-

Dean Scarlett received his law degree from Harvard Law School in 1951. While at Harvard he held three jobs to pay for his education.

For the next two years Scarlett worked as an associate with Lundgren and Lincoln, a small Wall Street law firm. In 1953 he returned to North Carolina to become the Assistant Director of the Institute of Government at the University of North Carolina at Chapel Hill.

Dean Scarlett originally went to law school because he wanted to go into the Foreign Service, so after two years with the Institute of Government he resigned to take the Foreign Service Exam. However, there was a year waiting period before he would receive an appointment and he needed something to do for that year so he went to teach at Ohio Northern University Law School. While there Dean Scarlett says he "taught everything as there were only five people on the faculty including the dean and the librarian."

Dean Scarlett never went into the Foreign Service; instead, after a year at



Dean Scarlett with his wife Sherry.

Ohio Northern University he traveled to Wake Forest, NC, and began teaching at Wake Forest College. This was in 1955, the year before Wake Forest moved to Winston-Salem. There were nine faculty members at the law school in 1955, then under the direction of Dean Carroll Weathers.

In 1960 Scarlett took a year off from teaching at Wake Forest when he received an American Political Science Fellowship (Congressional Fellowship) in Washington, DC. As part of that program he worked for an old roommate and good friend of John F. Kennedy. Because of this Scarlett became involved in Kennedy's inauguration and got to know President Kennedy fairly well. After Dean Scarlett returned to Wake Forest in 1961 he arranged to return to Washington, DC during the next two summers to serve as counsel for the Senate Judiciary Committee.

Scarlett stayed at the law school until 1962 when he was appointed Dean of the University of South Dakota Law School. He describes his five years at South Dakota University as a "real interesting experience. It was a lot of fun. I had to build up the law school and I got a lot of legislative help; therefore I had to get involved in politics. I also got deeply involved with the South Dakota Bar Association.

Since South Dakota only has one law school the Bar Association was like the South Dakota Alumni Association. I also began the Foundation there. The people were great, open and friendly. Everyone was always willing to help."

While at South Dakota University Dean Scarlett began working with the American Association of Law Schools and the American Bar Association attempting to develop federal support for legal education. Dean Scarlett also began 12 years of service as chairman of the Government Relations Committee which is a lobbying organization.

In 1968 Dean Scarlett headed to Des Moines, IA, where he accepted the position of Dean at Drake University Law School. During his first year at Drake, Dean Scarlett married Sherry Richards of Ohio.

While at Drake, Scarlett became very close to Neal Smith, the ranking Democratic member on the Education Subcommittee on House Appropriations. Through Smith, Dean Scarlett, as Chairman of the Government Relations Committee, got Congress to approve Title 11, which is a federal program that provides grants to law schools to help support clinical legal education programs. Dean Scarlett says that "Smith is primarily responsible for Title 11 being there and keeping it

there. Every year President Reagan omitted it from his budget and Smith got it back every year."

In 1979 Scarlett returned to Wake Forest as Dean after a 17 year absence. In addition to his duties as Dean, Scarlett insists on teaching several courses as well. "A dean is torn in two directions," Scarlett says. "You do not have time to do the best job you can as a teacher but if you do not teach you do not get to meet students other than major leaders and the ones who are in trouble. It's important to know the student body. And that's half the fun of the job: watching the students develop and feeling you were a part of that development."

Dean Scarlett also tried to be as involved as possible with alumni. "We have without question the most loyal group in the country," Scarlett believes. "In the last five years we've either been first or second out of all alumni in monetary support in the country." Wake Forest law alumni contribute approximately \$500,000 a year to the law school. Dean Scarlett attributes this loyalty to two things: "First, students leave here with a good taste in their mouth, and secondly, we try to keep in good contact with our alumni."

While at Wake Forest Dean Scarlett has been involved in a number of activities outside of the law school. He served for four years as chairman of the



With Associate Deans past and present: (L-R) Ken Zick, Art Gaudio, Bob Clodfelter, James Taylor, and Leon Corbett.

National Financial Aid Committee of the Law School Admission Council. While Scarlett was chairman the committee considered the possibility of getting involved in financial aid. This resulted in the creation of the Access Loan which has become a major way of financing a law school education. Dean Scarlett was also the Vice President of the North Carolina Bar Association Tort Reform Committee in 1987 and 1988.

"All the things we've been doing in the past ten years have combined to change the public perception of Wake Forest Law School from essentially a local practitioner oriented school to a kind of innovative, still professionally oriented law school with growing national recognition," Scarlett says. "And while we've been doing this we've been trying to maintain the best thing we have going for us—the Wake Forest mystique. One of my personal goals is that as we develop into a national law school we still retain some of the 'good stuff' about Wake Forest."

Dean Scarlett has many plans for his retirement. He would like to teach for four or five years until his son, Sean, who is a senior in high school, graduates from college. In addition, he would like to attempt to get the people of North Carolina more involved in the North Carolina higher education system. He is also looking forward to a little more free time to relax and "try to get my golf game up to the level of my wife's game!"

John D. Scarlett has made many great contributions to Wake Forest School of Law and we will miss him dearly.

By Donna Colberg, a second-year student from Parkersburg, WV.



Dean Scarlett and Associate Dean James Taylor.

John Scarlett— 10 Years as WFU Dean

Following ten years as head of the Wake Forest Law School John D. Scarlett is relinquishing the deanship. To fully understand how far the law school has come in the past ten years the reader must know something about Dean Scarlett's past.

He began teaching at Wake Forest in 1955 and remained until 1963. In that year he left to become the Dean of the Law School at South Dakota. While at South Dakota Dean Scarlett developed an improved relationship with the state bar association. In 1969, Scarlett accepted the deanship at Drake University Law School. While at Drake, Scarlett improved placement opportunities for his students by personally visiting local law firms to encourage employment of Drake graduates. Scarlett also developed a clinical program at Drake which gave the School of Law a reputation for being a "trial advocacy school."

On February 6, 1979, Scarlett returned to North Carolina to become the Dean of Wake Forest Law School. It is not surprising that he has been instrumental in improving the reputation of the school for the past ten years.

Technology has advanced immensely over the past ten years, and the law school has made use of innovations to improve learning. Videotaping is currently used as a teaching aid in Trial Practice courses in combination with computer technology. Computerized legal research has been expanded during Scarlett's tenure.

Scarlett has added several new faculty members, thereby substantially reducing the student to teacher ratio. Wake Forest law students are also getting more individual attention since the inception of the 440 Plan. Finding qualified professors has been one of Scarlett's priorities and his success has helped the law school and its students.

Scarlett could be characterized as the Dean of Programs. Over a ten year



Dean Scarlett shares a laugh with Professors Don Castleman and Rhoda Billings.

period he has been involved in improving and adding programs such as the Clinical Program, which provides students with practical real world experience; the JD/MBA Program in conjunction with the Babcock Graduate School; the London Program which gives law students an opportunity to study at the birthplace of common law; and the Continuing Legal Education Program.

The rising cost of education has been a fact of life in the 1980s, and many students could not attend law school without financial aid. Scarlett recognized this problem and has worked to improve the law school's financial aid program. Wake Forest will soon move to a new facility that is yet to be constructed. Scarlett helped convince Wake Forest administration that the current law school was just too small to provide for the necessary expansion of the Law Library and adequate state of the art legal education. Dean Scarlett

has always been a catalyst for change and he leaves the legacy of a better law school both now and in the future.

Wake Forest Law School has gone from a local North Carolina school to a regional law school with students from more than 35 states. Graduates practice law throughout the nation and current students win advocacy competitions against much larger and better known schools. Dean Scarlett is largely responsible for those achievements.

The most important part of any law school is its students, and Scarlett has not lost sight of what the students mean to Wake Forest. By providing improved placement, an opportunity for practical experience, and education using the latest technology, the law school through Dean Scarlett is certainly a students' school.

By Bob Richbourg, a third-year student from Nashville, GA.

DNC Chairman Ron Brown Speaks at BLSA Scholarship Banquet

A Who's Who of the legal and teaching professions, as well as the judiciary of Forsyth County and the state in general, filled the Grand Ballroom at the Hyatt Hotel in Winston-Salem for the 4th annual Black Law Students Association (BLSA) Scholarship Banquet on March 26. Outstanding honorees and a nationally prominent speaker helped to bring the crowd out to support the cause of endowing a scholarship to be awarded in the future to a deserving black student at the Wake Forest School of Law.

Among the honorees were Associate Justice Henry Frye of the North Carolina Supreme Court, and 21st Judicial District Judges Roland H. Hayes and Loretta Biggs. The keynote speaker was the recently-elected chairman of the Democratic National Committee, Ronald Brown.

At the conclusion of the banquet, Brown gave an inspirational message, mentioning that he was a founder of one of the first BLSA chapters in the nation at St. John's University School of Law. Brown sounded a call to arms for the members of the Democratic party in the audience, criticizing the Reagan presidency and vowing to do all he could to elect a Democrat to the chief executive position in 1992. He also pointed out the shameful statistic that the last president was elected in a race where only half of the eligible voters in the country participated. In addition, he stated his intentions to be a neutral chairman of the party, despite his past associations with Senator Edward Kennedy, for whom he was staff director, and Jesse Jackson, for whom he served as campaign manager during the 1988 presidential race.



DNC Chairman Ron Brown with second-year student Joe Ross. (photo by Hollandsworth)

After Brown's remarks, the honorees each received their awards. Secondvear student John McLemore introduced recent Wake Forest Law School graduate Larry Little ('88). Little pointed out that while 92 percent of last year's Wake Forest graduates passed their bar examinations, the passage rate among BLSA member graduates at the school was 100 percent. Little then introduced Justice Frye who accepted his award with a few words of thanks. Frye was appointed to the North Carolina Supreme Court in 1983 by then Governor Jim Hunt and was elected for an eight-year term the following year.

Third-year student DeAnna Leeper introduced Judge Loretta Biggs, who praised Wake Forest's commitment to enrolling blacks and its support of the BLSA organization. Biggs is the first black female district court judge to serve in the 21st Judicial District.

The final honoree was Judge Roland H. Hayes, introduced by second-year student Alvarez Abernathy. Hayes was the first black to serve as a district court judge in the 21st Judicial District.

After the presentations, Ms. Esther Woods provided a vocal performance accompanied by piano. Second-year student Joe Ross than gave an assessment of the progress that BLSA has had in establishing a scholarship fund. So far about \$8,000 has been raised toward a goal of \$10,000.

The last speaker of the night was Professor I.B. Covington, the BLSA advisor, who reported that applications by blacks to the law school were up by 75 percent and admissions of black students has risen by 150 percent. In addition, there has been the appointment of a black law professor, Luellen Curry, at the school. Two black members have been added to the Law School Board of Visitors and the CLEO program, a regional minority law student orientation event, will be held at the law school this summer.

By Dean Hollandsworth, a thirdyear student from Greensboro, NC



Ron Brown addresses the audience gathered for the BLSA Banquet. (photo by Hollandsworth)

Randall Wins 1989 Zeliff Competition

When the time came for Judge Robert D. Potter to declare a winner in the final round of the 1989 Zeliff Trial Competition, he wasn't quite ready, "I have to make decisions every day," he explained, "but they aren't usually this difficult." It's safe to say that no one in the courtroom envied his position: second-year student Michael J. Randall and third-year student Damon V. Pike had both made excellent presentations. In the end, however, Judge Potter, District Court Judge for the Western District of North Carolina, made his decision and declared Randall the winner.



Mike Randall

Randall and Pike argued the final round of this year's Zeliff competition on February 26 in the Law School Courtroom. The Zeliff Trial Competition is an annual event at Wake Forest which promotes trial advocacy skills and recognizes some of the outstanding student advocates boasted by the Law School. The competition is sponsored by the Student Trial Bar and is funded by the Cynthia J. Zeliff Fund—a gift that honors the memory of Cynthia

Zeliff, a 1973 law school graduate who was killed several years ago in an accident.

The competition is also supported by faculty members, local attorneys and judges, many of whom are themselves Wake Forest Law School graduates. Preliminary rounds are held over several weeks, and are judged by students and volunteers from the legal community. The result is an active competition in which students receive constructive criticism on advocacy techniques whether they win or lose.

The case with which Randall, Pike, and over 30 other second- and third-year advocates dealt in this year's Zeliff competition concerned the alleged misappropriation of a trade secret. The defendant in the case was a chemical engineer who had tendered his resignation with a major oil company at a time when it was developing a revolutionary new fuel additive. Not long after his resignation and before the company had put the product on the market, the engineer's new employer, a comparatively fledgling outfit, intro-

"There are two reasons why I entered this competition. First of all, to have fun. And secondly, to get critiques from experienced lawyers. That's what makes it so worthwhile."

-Mike Randall

duced its own additive, which had a formula chemically identical to his former employer's product. Armed with this information, deposition transcripts, warehouse and shipping receipts and their own creativity, the 1989 Zeliff Trial Competition participants argued either "misappropriation" or "coincidence," depending on which side of the case they had drawn.

Randall represented the defendant engineer in his winning effort, while

"I have to make decisions every day, but they aren't usually this difficult." —Judge Robert D. Potter

Pike argued the side of the major oil concern. Their final round was a study in contrasting styles and methods, each effective in a different way. While Pike's polished and confident approach was convincing, Randall's promise to tell the jury the "rest of the story" and the earnest and informal manner in which he did it took the winner's plaque. Judge Potter told the two that while the decision was difficult, he decided in Randall's favor because he "seemed to believe in his case the most."

Competition Chairman Doug Meis commented that the month-long event had gone well from his perspective. "The attorneys judging the rounds," he noted, "were generally very impressed with the talent of the participants." The 1989 Zeliff winner Mike Randall agreed with this evaluation of the competitors he faced, and also stressed the importance of the judges themselves. "There are two reasons why I entered this competition," he said. "First of all, to have fun. And secondly, to get critiques from experienced lawyers. That's what makes it so worthwhile."

By David C. Wagoner, a second-year student from Charlottesville, VA



Damon Pike

Law Review Hosts Business Symposium

The Wake Forest Law Review held its third annual Business Symposium on Friday, March 31, 1989, at the Graylyn Conference Center in Winston-Salem. The topic was "Director and Officer Liability and Indemnification", and by all accounts, the day was a success.

The symposium is the live complement to the annual Business Symposium issue of the Wake Forest Law Review, which is dedicated to articles on a selected business topic. The Law Review's symposium editors, consisting of third-year students Robert Higdon, Eric Reeves, and Edwin Williamson, began the process of compiling the Business Symposium issue by soliciting articles from noted professors, scholars, attorneys, judges, and other experts in the field of the chosen topic. Student-written comments were also chosen from outstanding Law Review authors. The highest quality and most appropriate works were then selected for publication. After editing, the articles were compiled into the special issue which is usually published in the Spring.

While revolving around the central theme, each article and comment analyzes a different aspect of the business topic. With this approach, the goal of comprehensively covering the many facets of a complex issue is achieved. "The advantage of having several articles is that we can cover a broad area while still having the focused detail of the individual works," explained Higdon.

Authors of the published articles were invited to speak at the symposium, which was held soon after the special Law Review edition was published. This year's author/speakers were an illustrious group.

Jesse A. Finkelstein of Richards, Layton & Finger in Wilmington, DE, was the program's keynote speaker. Finkelstein's address served as an introductory overview of the history of corporate director liability. Next, Robert Hamilton, Professor of Law, University of Texas School of Law, delivered his article entitled "Reliance and Liability Standards for Outside Directors". Professor Hamilton is an eminent corporate legal scholar and the editor of a corporations textbook used by Wake Forest Law School professors.

Dale Oesterle, Professor of Law, Cornell Law School, spoke on "The Effect of Statutes Limiting Directors' Due Care Liability on Hostile Takeover Defenses". Douglas Branson, Professor of Law, University of Puget Sound, diseussed his article entitled "Intracorporate Process and the Avoidance of Director Liability".

Another speaker was Clarence Walker of Kennedy, Covington, Lobdell & Hickman in Charlotte. Walker, a past president of the North Carolina Bar Association, delivered his article entitled "Should Corporate Statutes Providing Special Protection for Directors Be Limited to Publicly Traded Corporations?" Finally, former North Carolina Supreme Court Justice J. Phil Carlton and Guy Brooks, both of Poyner & Spruill in Raleigh, discussed their article "Corporate Director and Officer Indemnification: Alternative Methods for Funding."

Wake Forest Law Review students J. Erik Groves and Michael Mitchell contributed comments to the Business Symposium issue. Groves' comment was "Corporate Law and Director Liability: Who's Really Sitting on the Three-Legged Stool and Why North Carolina Should Care." Mitchell contributed "North Carolina's Statutory Limitation on Directors' Liability."

An important part of the program was the panel discussion period provided after each speaker. This feature allowed panelists and audience members to discuss and clarify issues brought up during the speaker's address. The panel was comprised of Professor Thomas Hazen of the University of North Carolina Law School, Professor George Dent of New York Law School, Wake Forest Professor of Law Ralph Peeples, Wake Forest Assistant Professor of Law Alan Palmiter, and Finkelstein.

The Business Symposium qualified

for five North Carolina Continuing Legal Education (CLE) credits this year. However, the symposium editors see it as more than just an academic event for attorneys. "The symposium is as much for Wake Forest law students as it is for practicing attorneys," Reeves explained. The symposium, he noted, provides "an opportunity to show the legal community the high caliber of Wake's law students" through interaction at the event and the quality of the program.

This and past years' symposia have explored timely issues in the realm of public corporations. However, next year's version may focus on issues facing smaller business organizations such as partnerships, sole proprietorships and small, closely held corporations. "These are very important organizations as well. They present equally complex business issues which affect as many or more people than do those arising in large, publicly-held corporations," said Williamson. While the narrow focus of the programs may change, Williamson explained that "the symposium will remain dedicated to important legal issues in the business community and the resulting implications for the business lawyer."

A tremendous amount of work went into this year's symposium, and much of its success can be attributed to the hard work of the symposium editors. The trio of Higdon, Reeves, and Williamson began work on the project in April of last year, soon after their election to the Law Review's Board of Editors. Higdon labels the group's effort as "a lot . . . a lot times three," while Reeves estimates that they have put 300 hours worth of work into the project from start to finish. However, all three students agree that putting together the symposium was a rewarding and challenging experience.

Approximately 60 people attended the business symposium, held for the second time at Graylyn Conference Center in Winton-Salem, NC. Graylyn is a part of Wake Forest University and is considered one of the premier conference and retreat facilities in the country.

By Dan Kennedy, a third-year student from Owosso, MI.

Trial Team Advances to Nationals

The Wake Forest National Trial Team swept the regional competition in Raleigh, NC, this spring and advanced to the national competition in Dallas, TX. Wake Forest sent two teams to the five-state regionals and won the championships in two separate brackets—a rare feat that was made even more unusual by the fact that one of the teams consisted solely of second-year students.

Third-year team members were Gilbert Andia, Christine Ryan and Scott Templeton. Jim Hutcherson was the alternate. The second-year team consisted of Kenneth Carlson, Len Cohen and David Flowers. In Dallas, the second-year team advanced to the



National Trial Team February 1989

Wake Forest's National Trial Team members: (L-R) Ken Carlson, Scott Templeton, Bert Andia, Christine Ryan, Len Cohen, Professor Carol Anderson, David Flowers, and Jim Hutcherson.

quarterfinals before losing to the ultimate national champion.

Professor Carol Anderson coached the team through months of preparation

for two separate criminal trials. The teams send a special thanks to all those attorneys who offered such valuable criticism as they prepared.

NCATL Chapter Hosts Mock Trial

The Wake Forest Chapter of the North Carolina Academy of Trial Lawyers presented a mock trial in the law school courtroom on the morning of April 1, 1989. Three area attorneys participated in the trial as well as several students. Attorney Larry Fine ('82) represented the estate of James Williams with third-year student D.J. Sheikh portraying the deceased's widow. Attorney George Cleland represented the defendant, Jerry Bostic, portrayed by first-year student Jeff Malarney. Attorney Anne Connally ('80) acted as judge during the trial.

The trial involved a fact situation specific to Wake Forest, using a campus location as the scene of the fatal accident giving rise to the suit. The estate of Professor Williams brought the wrongful death action against Jerry Bostic, the student who was driving the car which hit Professor Williams as he was jogging near the campus.

The attorneys went through voir dire, picking the jurors carefully, then each gave opening statements before questioning witnesses. The plaintiff's witness, portrayed by second-year student Charles Gavins, was an eyewitness to the accident. He was grilled by Cleland as to the accuracy of his account of the events. The defendant then took the stand and received similar treatment from Fine, who gained an admission from the defendant of a prior DWI conviction. Closing statements followed, and at the trial's conclusion a question and answer session took place.

The Wake Forest chapter of the NCATL seeks to promote interest in trial advocacy among the students of the law school by working with the state-wide organization to offer litigation-oriented events like the mock trial and opportunities to attend the same CLE seminars offered to practicing attorneys. The newly-elected officers for the 1989-90 school year are: President, Donna McLamb; Vice-President, Rick Bradley; Secretary, Scott Mebane; and Treasurer, Harlan Horton. The chapter has experienced a year of rebuilding and reorganization under the leadership of outgoing President Sheikh, and looks forward to a more active place among the law school organizations at Wake Forest.

By Dean Hollandsworth, a thirdyear student from Greensboro, NC.

Wake Forest Celebrates Law Day

On March 17 and 18 the School of Law celebrated Law Day for the 37th consecutive year. The Law School celebrates Law Day earlier than the rest of the country. President Dwight D. Eisenhower first proclaimed LAW DAY USA throughout the nation on May 1.

Law Day recognizes the contributions of different Americans to the field of law and acknowledges the constitutional roots of American jurisprudence. In addition, Law Day serves to inform citizens in government and community affairs, encourage voting, modernize American courts and foster a deeper respect for the law.

This year's Student Bar Association, led by President Tammy Childress, offered several innovative activities to the Law Day program. The festivities began Friday morning with faculty and students discussing the direction of American jurisprudence over croissants and orange juice.

The SBA held a dart throwing fund raiser that benefitted the Forsyth County Volunteers. The prizes, donated by Winston-Salem area merchants, included pizzas, T-shirts and free video rentals. The cost of each dart was one dollar. Money raised from the event will go to underprivileged children through the Forsyth County Volunteers Program.

Another philanthropic venture coinciding with Law Day was organized by the Public Interest Law Organization (PILO). PILO held a children's book drive to benefit Winston-Salem area children, specifically children in the Project Breakout program and the Bethlehem Day Care Center. Project Breakout attempts to help children break out of the cycle of poverty, while the Bethlehem Day Care Center is a center for children from low income



Dean Scarlett presiding at the Law Day Banquet. (photo by Dellinger)

families. The book drive raised over 100 children's books and also \$190 to be applied toward buying more books. Gay Maness, PILO President, hopes that the book drive will become an annual affair.

Friday night, Law Day festivities continued at Michael's Restaurant for a "happy hour". Students mingled during pre-dusk hours and reminisced about their law school experiences.

Saturday, the Student Bar Association held their annual Barrister's Ball. The Ball, a semi-formal affair, was celebrated at the Benton Convention Center. Childress opened the program by welcoming students, faculty, alumni and friends of the law school to the Law Day Speaker's Program which was held in conjunction with the Ball. Childress introduced Associate Dean Arthur Gaudio who presented the new SBA officers for 1989-90. The officers are: Amy Jackson (rising 3L), President; Susan Curtis (rising 3L), Vice President; Stacy Chamberlain (rising 2L), Secretary; and Chris Zuelke (rising 3L), Treasurer. Following the induction of the new officers, SBA Vice President, Ginny Conley, presented Childress with a plaque recognizing Childress' tremendous contribution to the School of Law.

After the presentation to Childress, Jurist Editor-in-Chief Robert Ruegger announced the third-year class chose Professor Patricia Roberts to receive the Jurist Excellence in Teaching Award. Professor Roberts, who recently became a Professor of Law at Wake Forest, teaches Decedents' Estates and Trusts, and Future Interests. Ruegger pointed out that Professor Roberts was recognized by the third-year class for her excellent contributions to their legal education. Ruegger also noted that Professor Roberts is the first woman to receive the Jurist Award.

In accepting the award, Professor Roberts expressed surprise and extreme gratitude to the class. She also thanked her colleagues and staff for all their help, in particular, Professor Charles P. Rose. The audience displayed its appreciation for Professor Roberts by giving her a standing ovation. This was a fitting tribute to a professor who helps students understand the difficult concepts associated with Property and Tort law. The recipient of the Jurist Excellence in Teaching Award is decided by anonymous vote of the third-year class.

Newly-inducted SBA President Amy Jackson, in her first official act of office, presented the Alumni Award for Outstanding Service. This year, Wake Forest Law School honored two people. The first award went to Judge Hiram H. Ward. The second award was given posthumously to the late Judge William Z. Wood. Judge Wood's wife accepted the award on his behalf.

After the Alumni Award, Professor George K. Walker introduced this year's Law Day speaker, The Honorable N. Carlton Tilley Jr., United States District Judge for the Middle District of North Carolina, Professor Walker noted that Judge Tilley attended Wake Forest as an undergraduate and law student. Upon graduating from law school, Judge Tilley clerked for Judge Eugene Gordon, the United States District Judge for the Middle District. He then served in the United States Attorney's office as an assistant United States attorney for three years and became the youngest United States attorney in the country in 1974. He entered general practice in Greensboro with the law firm of Osteen, Adams, Tilley and Walker. He was recently appointed to the federal bench.

Judge Tilley spoke about "Nostalgia, Fun and Rule 11." He happily reminisced about his Wake Forest days as a student and alumnus. He mentioned that we should take our work, but not ourselves, seriously. Referring to Oliver Wendell Holmes, Judge Tilley stated that there are three "You's": (1) the you you think you are; (2) the you others think you are; and (3) the you you really are. He pointed out that each lawyer must be true to himself and be the "you you really are."

Referring to Rule 11, Judge Tilley noted that the rule is an effective rule and can be used as an offensive weapon by attorneys. Finally, Judge Tilley remarked that you should enjoy what you're doing. Following Judge Tilley's speech, faculty, students, and friends danced to the sounds of Covacus at the Convention Center. Because of the tireless work performed by the Student Bar Association, retiring Dean John D. Scarlett remarked that this was the "best Law Day ever" at Wake Forest.

By Ken Brosnahan, a third-year student from York, PA.



Judge Hiram H. Ward. (photo by Dellinger)



Mrs. William Z. Wood. (photo by Dellinger)



Judge N. Carlton Tilley, Jr., with flowers presented by SBA President Tammy Childress. (photo by Dellinger)

LAW DAY 1989



Todd Long and Reid McGraw. What's so funny guys? (photo by Dellinger)



Rod Willcox with SBA President Tammy Childress. (photo by Dellinger)



Tommy Doughton poses with his fiancee. (photo by Dellinger)



James and Carrie Bullock. (photo by Dellinger)

Pat Roberts— 1989 *Jurist* Teacher of the Year

Every year third-year students at Wake Forest University School of Law have the opportunity to select a professor they think deserves the *Jurist* Excellence in Teaching Award. This year the students chose Professor Pat Roberts.

Professor Roberts received her law degree from Ohio State where she graduated summa cum laude. She came to Winston-Salem when her husband, Professor Tom Roberts, took a job teaching in the law school. When a



Pat Roberts

position opened for a future interests teacher, Professor Roberts agreed to fill the position. She stayed on as an adjunct professor for a while, then became fulltime as she is today. When asked what she enjoys most about teaching, Professor Roberts said that she feels very rewarded when she thinks students got a lot out of a particular class. Also, she enjoys taking an area that people find confusing and explaining it in a way that makes it understandable. Clearly her students agree that it is something she does well.



Pat Roberts receiving the Jurist Excellence in Teaching Award. (photo by Dellinger)

Professor Roberts' specialty lies in the area of wills, trusts, and future interests. She has put her talents to work serving on the legislative committee of the Fiduciary Administration and Estate Planning Section of the North Carolina Bar Association. Professor Roberts was involved in the Bar Association's successful effort to abolish the Rule in Shelley's Case in North Carolina. Part of her effort included testifying before the North Carolina Senate and the House of Representatives on this issue. She has published several articles in the area of wills and future interests, including "Lapse Statutes: Recurring Construction Problems," 37 Emory L.J. 323 (1988) and "Class Gifts in North Carolina—When Do We Call the Roll?,"21 Wake Forest L. Rev. 1 (1985).

Even those who have never had Professor Roberts as a teacher are familiar with one of her hobbies. She is a runner and has competed in many races around the area. She has won the female division of the Race Judicata eight times. In 1987 she was voted Female Masters Runner of the Year by the North Carolina Road Runners Association. She says that other than being with her family, running is the main way she spends time outside of the law school.

By Karen Freisen, a second-year student from Wasilla, AK.

Recipients of the *Jurist* Excellence in Teaching Award

1979 — I. B. "Butch" Covington

1984 — George Walker

1980 — Dean Pasco Bowman

1985 — Charles Rose

1981 — Ralph Peeples

1986 — James Bond

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1982 — I. B. "Butch" Covington

1987 — Ralph Peeples

1983 — Charles Rose

1988 — Miles Foy

1989 — Patricia Roberts

Legal Articles

Shareholder
Advances: Are
They Taxable as
Debt or Equity?:
A Summary of
the Former
Treasury
Regulations and
Current Case
Law as a
Guideline for
Classification

By Dale Gunter

A corporation is usually financed from two sources: money furnished by stockholders who hold an equity interest in the business in the form of stock of the corporation, and money lent to the corporation by formal creditors in exchange for a debt instrument of the corporation. The corporation serves as a form of business ownership of which the stockholders are the ultimate beneficiaries, or in the case of failure, the ultimate losers. On the contrary, a formal creditor who "lends"



Dale Gunter

money to the corporation does not own an equity interest in the corporation, but instead holds a debt instrument of the corporation which entitles him to the right to receive fixed and limited benefits of interest income agreed upon at the time the loan is made.³ Furthermore, the formal creditor receives the corporation's unconditional promise that his money will be protected as much as possible from the risk of the corporation's business and will be returned on the due date of the loan.⁴ Hence, the vital difference between the shareholders and the creditor is:

The shareholder is an adventurer in the corporate business; he takes the risk, and profits from success. The creditor, in compensation for not sharing the profits, is to be paid independently of the risk of success, and gets a right to dip into the capital when the payment date arrives.⁵

The tax law places great significance on the way in which a corporation is financed.⁶ Taxation of the corporation and the individual investors can vary enormously depending upon whether capital is invested in the corporation as debt or equity.⁷ The most troublesome case in this area occurs when an investor purporting to be a creditor is also a shareholder of the corporation making it very difficult to define a particular relationship between corporation and investor.⁸

A. Significant Tax Distinctions Between Debt and Equity

The choice between debt and equity can affect the tax status of the corporation and its investors in a number of different ways, 9 the two most significant of which are (1) current distributions and (2) return of investment. 10

1. Current Distributions

Section 163(a) of the Internal Revenue Code allows the payor corporation to deduct all "interest paid or accrued within the taxable year on indebtedness."11 However, no comparable deduction exists for distributions by the corporation to its shareholders. 12 Furthermore, while dividends, a payment by the corporation to the stockholder of his share in the profitability of the corporation, are not deductible by the corporation on distribution to shareholders, they are includible in the income of noncorporate shareholders upon receipt.13 As a result, dividends are taxed at the corporate level when earned and then taxed again at the personal level when received by the shareholder, thus providing an incentive to structure the transaction as debt

¹See Hamilton, Corporations Including Partnerships And Limited Partnerships: Cases and Materials, (Second Edition, West 1981) pp. 253-54.

²Id.

³Id.

4Id.

⁵Commissioner v. O.P.P. Holding, 76 F.2d 11, 12 (2d Cir.).

6See Lind, Fundamentals of Corporate

Taxation: Cases and Materials, (Second Edition, Foundation Press 1987) p. 103.

7Id.

8ld.

⁹For an extensive compilation of the divergent tax effects of debt and equity, see Plumb, The Federal Income Tax Significance of Corporate Debt: A Critical Analysis and Proposal, 26 Tax L. Rev. 369 (1971).

¹⁰Lind, Fundamentals of Corporate Taxation:

Cases and Materials, at 103-04.

11IRC 163(a)

¹²Lind, Fundamentals of Corporate Taxation: Cases and Materials, at 103.

13ld. IRC 301(a) provides that a "distribution... with respect... to stock" shall be included in the recipient's gross income to the extent of earnings and profits of the corporation. An 80% dividends received deduction provides relief for corporate shareholders. IRC 243.

as opposed to equity to avoid imposition of this "double tax." ¹⁴

2. Return of Investment

Retirement of corporate debt or redemption of stock is not a taxable event to the issuing corporation, assuming that appreciated property is not used to effect the transaction and that there is no unamortized original discount¹⁵ or premium¹⁶ with respect to the debt instrument.17 However, the tax treatment of debt and equity is dramatically different at the investor level. Ordinarily, shareholders who have stock in public corporations redeemed by the corporation apply the proceeds against their adjusted basis in the redeemed stock and realize capital gain or loss to the extent of any excess or shortfall.18

Similarly, amounts received by creditors on the retirement of any corporate debt instrument are considered as amounts received in exchange for the instrument.¹⁹ Thus, the amount received is a nontaxable return of capital to the extent of the holder's basis in the retired instrument, but to the extent of any accrued market discount, the gain is taxed as ordinary income rather than capital gain.²⁰

In sharp contrast to the favorable tax treatment afforded most redemptions of stock of public corporations and retirement of debt obligations, some stock redemptions, especially in the case of close corporations, run a substantial risk of being treated as dividends without any offset for the shareholder's basis in the redeemed

shares.21 Such reclassification would result in ordinary income to the extent of the distribution received by the shareholder.²² However, if the redemption completely terminates the shareholder's interest in the corporation or is substantially disproportionate relative to other shareholders, the distribution will be treated as a redemption.23 Unfortunately, qualifying under such safe harbors is not as easy as a quick perusal of Section 302 would indicate, because when evaluating redemptions as either a complete termination of interest or a substantially disproportionate distribution, the attribution rules of Section 318 shall apply.²⁴ The attribution rules essentially require that any indirect ownership via family members, beneficiary to entity, entity to beneficiary or stock options, be attributed to the stockholder.25 Attribution makes it extremely difficult for a distribution to qualify as a complete termination of interest or substantially disproportionate distribution; hence, it is in the shareholders' interest from a tax perspective to hold debt as opposed to equity.

3. Other Tax Considerations

The issuance of debt may provide a defense against imposition of the accumulated earnings tax if the corporation amasses money to pay off debt obligations. ²⁶ The obligation to repay a debt at maturity may qualify as a valid business reason for accumulating corporate earnings, whereas a similar accumulation to redeem stock probably would not. ²⁷

Reclassification of a class of debt to a class of preferred stock could result in the disqualification of a corporation's Subchapter S election because to qualify under Subchapter S, a corporation can only have one class of common stock.²⁸

Likewise, corporate reorganizations may be affected by the classification on an interest as debt or equity. Stock may be distributed in exchange for stock in a corporate reorganization without recognition of gain or loss, while the distribution of debt in exchange for stock is a taxable distribution of boot.²⁹ Furthermore, if substantial amounts of debt are distributed to the acquired corporation's shareholders, the transaction may fail to qualify as a reorganization because it lacks continuity of interest.³⁰

The classification of an investment interest also has an impact on whether or not the transaction qualifies for nonrecognition under Section 351. Complete nonrecognition is available to a shareholder upon contributing assets to the corporation if he receives solely stock or securities in exchange for his contribution.³¹ Hence, receipt of short term notes, usually with a term of five years or less, results in gain to the shareholder, whereas receipt of stock in exchange for a contribution of assets almost always results in complete nonrecognition.³²

Finally, classification of an interest in a corporation as either debt or equity may control the character of a loss if the investment becomes worthless.³³
Stock or debt instruments held for

¹⁴Lind, Fundamentals of Corporate Taxation: Cases and Materials, at 103.

¹⁵Unamortized original discount occurs when a debt instrument is issued for less than its fair market value and it is equivalent to the difference between the fair market value of such instrument and its issue price. See former Treas. Reg. 1-385-3(a)(2) and IRC 1232.

¹⁶A premium will occur when the purchase price of a debt instrument exceeds its fair market value and it is equivalent to the difference between the purchase price and fair market value of the instrument. See former Treas. Reg. 1.385-3(a)(2) and IRC 1232.

¹⁷See IRC 311(a) and IRC 1271 and 1272.

¹⁸See IRC 302 and 301(c)(2) & (3).

¹⁹See IRC 1271(a)(I).

²⁰Id. For this purpose IRC 1275(a)(1) defines a "debt instrument" as a bond, debenture, note, certificate, or other evidence of indebtedness.

²¹See IRC 302 and Lind, Fundamentals of Corporate Taxation:Cases and Materials, at 104.

²²See IRC 302(b) and Lind, Fundamentals of Corporate of Taxation: Cases and Materials, at 176.

²³See IRC 302(b)(2) & (3).

²⁴See IRC 302(c)(1).

²⁵See IRC 318. For a more complete analysis of the attribution rules, see, Lind, Fundamentals of Corporate Taxation: Cases and Materials, at 178-79.

²⁶See Lind, Fundamentals of Corporate Taxation: Cases and Materials, at 104. The accumulated earnings tax is a penalty for accumulating income within the corporation and is usually imposed by IRC 531 when corporate retained earnings exceed \$250,000.

²⁷Lind, Fundamentals of Corporate Income Tax: Cases and Materials, at 104.

²⁸IRC 1371(a)(4). Courts have split on this

issue. Compare Portage Plastics Co. Inc. v. United States, 486 F.2d 632 (7th Cir. 1973), and W.C. Gamman, 46 T.C. 1 (1966) (both holding that treatment of a class of debt as preferred stock does not disqualify a Subchapter S election), with Catalina Homes, 23 T.C. M. 1361 (1964) (holding that such recharacterization does disqualify the corporation's election).

²⁹See generally IRC 354(a)(2).

³⁰Treas. Reg. 1.368-1(b); Rev. Proc. 79-14, 1979-1 C.B. 496.

³¹See Lind, Fundamentals of Corporate Taxation: Cases and Materials, at 104.

³²Id. at 67. For such transactions to qualify for nonrecognition, the control requirements of 351 must be satisfied. For a discussion of the control requirement of 351, see Lind, Fundamentals of Corporate Taxation: Cases and Materials, at 61-62.

³³Id. at 104.

more than 6 months usually result in capital losses when they become worthless.³⁴ However, if an individual or other noncorporate creditor's claim is not evidenced by "a bond, debenture, note, or certificate or other evidence of indebtedness... with interest coupons or in registered form"³⁵ and is attained as the result of an effort to protect the creditor's position as an employee of the debtor, the loss may be classified as an ordinary loss.³⁶

B. Problems With Classification of an Interest as Debt or Equity

In attaching significant tax consequences to debt as opposed to equity, the Internal Revenue Code presupposes that these two alternative forms of investment can be distinguished from one another. However, prior to 1969, the Internal Revenue Code provided no guidance in defining the terms "debt" and "equity." "The crux of the classification problem is that debt and equity are labels for the end of a spectrum."37 At one end of the spectrum is an instrument referred to as "straight debt," an instrument carrying only rights to debt-like payments of fixed principal and interest.38 At the other end of the spectrum is a pure equity instrument, which entitles the holder to the residual benefits of ownership of a corporation and an equally unlimited subjection to the burdens thereof.39 Between straight debt and pure equity instruments lie an infinite number of instruments with a combination of debt and equity characteristics, such as hybrid instruments, instruments issued with an unreasonable interest rate, instruments issued proportionately to stock held of the issuer, instruments issued when the corporation has excessive debt, and loans of the corporation

guaranteed by shareholders.40

In 1969, with the enactment of the Tax Reform Act of 1969, Section 385 was added to the Code⁴¹ authorizing the Secretary of the Treasury to issue regulations that would "determine whether an interest is to be treated... as stock or indebtedness."⁴² Section 385 provided five factors that might be considered in the drafting of such regulations:

- (1) The presence of an unconditional promise to pay a sum certain on a fixed maturity date, or on demand, coupled with a promise to pay a fixed rate of interest:
- (2)Subordination to or preference over any indebtedness;
 - (3) The issuer's debt/equity ratio;
 - (4)Convertibility; and
- (5) The relationship between holdings of stock in the corporation and holdings of the interest in question.⁴³
- 1. The Treasury Department's Fatal Attempt to Define Debt and Equity

Using these five factors as guidance, the Treasury Department, more than a decade later on March 24, 1980, finally issued proposed regulations which sought to clarify the distinction between debt and equity.⁴⁴ After extensive criticism and substantial revision, the final regulations were published in the Federal Register on December 31, 1980.⁴⁵

Treatment of Instruments Generally — Treas. Reg. 1.385-4

Treas. Reg. 1.385-3(c) defined the term "instrument" as "any bond, note, debenture, or similar written evidence of an obligation." The regulations further provided that all instruments were to be treated as indebtedness unless specifically recharacterized as preferred stock. 46 An instrument would

never be recharacterized as stock if it was a straight debt instrument and if it was issued and held disproportionately to the stock of the issuer.⁴⁷ However, any instrument which was recharacterized as stock was to be treated as preferred stock for all purposes of the Code,⁴⁸ and under no circumstances could it then ever be reclassified as debt.⁴⁹

Adjustment of Interest Rate—Treas. Reg. 1.385-3

Any instrument issued to a shareholder, whether reclassified as preferred stock or not, was subject to the issue price rules⁵⁰ which sought to impose an arm's length interest rate by adjusting the issue price of the instrument.⁵¹ If the consideration paid for the instrument by the shareholder exceeded the fair market value of the instrument and the shareholder previously owned stock of the corporation or acquired stock through the same transaction as the loan, the excess was treated as a contribution to capital by the shareholder and was added to the shareholder's basis in his stock in such corporation.⁵² The shareholder took a basis in the instrument equal to its fair market value with the difference between the shareholder's basis in the instrument and its fair market value constituting original issue discount.53 Such original issue discount was to be taxed to the shareholder as imputed interest income ratably over the instrument's life, and the corporation was entitled to offsetting deductions for imputed interest income.54

Conversely, if the fair market value of the instrument was greater than the consideration paid, the excess was treated as a distribution to the shareholder creating amortizable bond premium which was to be ratably deducted

³⁴See 1RC 165(g)(1).

³⁵IRC 165(g)(2)(C).

³⁶See Trent v. Commissioner, 291 F.2d 669 (2d Cir. 1961) (accepting the job protection argument to attain business loan classification).

³⁷Bittker & Eustice, Federal Income Taxation of Corporations and Shareholders, 4.02 (5th ed. 1987).

³⁸Id.

³⁹ld.

⁴⁰ld.

⁴¹P.L. 91-172, 415(a), 83 Stat. 487 (1969).

⁴²¹RC 385(a).

⁴³¹RC 385(b).

⁴⁴Prop. Treas. Reg. 1.385-1 to 1.385-12, 45 Fed. Reg. 18, 957 (March 24, 1980).

⁴⁵T.D. 7747, 1981-8 1.R.B. 15 (Feb. 23).

⁴⁶Treas. Reg. 1.385-4(a)(c)(1) (1981) (subsequently withdrawn in 1983).

⁴⁷See Levin, The Section 385 Regulations Regarding Debt Versus Equity: Is the Cure Worse Than the Malady?, 35 Tax Lawyer, 1 (1981).

⁴⁸Treas. Reg. 1.385-4(c) (1981) (subsequently

withdrawn in 1983).

⁴⁹Treas. Reg. 1.385-4(b) (1981) (subsequently withdrawn in 1983).

⁵⁰Treas. Reg. 1.385-3(a) (1981) (subsequently withdrawn in 1983).

⁵¹See Levin, supra note 47, 35 Tax Lawyer 1, 13-14

⁵²Treas. Reg. 1.385-3(a)(1) (1981) (subsequently withdrawn in 1983).

⁵³Id.

⁵⁴Treas. Reg. 1,1232-1(a) (1981) (subsequently withdrawn in 1983).

by the shareholder over the life of the instrument, reducing the shareholder's interest income.⁵⁵ The amortizable bond premium was also to be recognized as ordinary income by the corporation ratably over the life of the instrument, effectively reducing the corporation's deduction for interest paid.⁵⁶

The regulations created a safe harbor to avoid adjustment of the interest rate on an instrument providing that an instrument's fair market value would always be considered equal to its issue price if (1) it was a straight debt instrument, (2) the consideration paid was equal to the face amount of the instrument and (3) the stated annual rate of interest was reasonable.⁵⁷

Treatment of Hybrid Instruments— Treas. Reg. 1.385-5

Hybrid instruments are any debt instrument issued which also carries equity features, such as conversion rights or rights to contingent payments. 58 Under the regulations, a hybrid instrument was treated as preferred stock on the day of its issue if the fair market value of the instrument without the equity features was less than 50 percent of its actual fair market value with such features. 59

Instruments Issued Substantially Proportionately to Stock—Treas. Reg. 1.385-6

The regulations contained a series of seven tests which recharacterized debt instruments as preferred stock on the date of issue if such instruments were issued to the corporation's shareholders in roughly the same proportions as the shareholders owned the corporation's stock60 or, even if the instrument was issued disproportionately to the issuer's stock, if the instrument was issued to a shareholder and if there were related non-arm's length transactions with other shareholders which compensated for those features of the instrument's terms which were not arm's length.61 Debt instruments were subject to reclassification upon being issued substantially proportionately to the issuer's stock if:

- (1) such instruments were hybrid instruments;⁶²
- (2) such instruments were issued in exchange for property other than case;⁶³
- (3) such instruments were issued by corporations with excessive debt;⁶⁴
- (4) there was a change in terms of outstanding instruments;65
- (5) the corporation failed to pay part or all of the interest due on an instrument during a given year before 30 days after the close of that year;66
- (6) the instruments were payable on demand and the interest charged was not reasonable;⁶⁷ or
- (7) the corporation failed to make a scheduled payment of principal on an instrument within 90 days after the due date and the holder failed to exercise the ordinary diligence of a formal creditor.⁶⁸

Treatment of Unwritten Obligations— Treas. Reg. 1.385-7

Unwritten obligations to a lender other than an independent creditor which were not evidenced by an instrument within six months after the making of the loan were treated as a contribution to capital if on the day the loan was made, the debtor corporation had excessive debt.⁶⁹ Furthermore, unwritten obligations would be treated as a contribution to capital if within any taxable year the debtor corporation failed to pay (within the year or 90 days thereafter) interest on the loan at a reasonable rate.⁷⁰

Treatment of Guaranteed Loans— Treas. Reg. 1.385-9

The regulations provided that if a shareholder guaranteed a loan to the corporation, either directly or by pledging collateral, and under principles of existing law the loan was treated as made to the shareholder, then the shareholder was treated as having made a contribution to capital of the corporation in the amount of the loan.⁷¹ Repayment of the loan by the corporation was then treated as a payment made on behalf of the shareholder, resulting in a constructive dividend.⁷²

Treatment of Preferred Stock— Treas. Reg. 1.385-10

Hybrid preferred stock was treated as an instrument for purposes of the regulations, and then tested under any of the rules for instruments which were

withdrawn in 1983). The regulations provided that the interest rate on a recourse obligation was always considered reasonable if the debt-to-equity ratio of the debtor was no more than 1-to-1, and if the interest rate was equal to or fell between any two of the following rates:(1) the statutory rate applicable to deficiencies under 6621, (2) the prime rate in effect at any local commercial bank, or a rate determined by the Secretary with reference to the rate on U.S. obligations of comparable term to maturity. Treas. Reg. 1.385-6(e)(2), (3)(1981)(subsequently withdrawn in 1983).

⁶⁸Treas. Reg. 1.385-6(1)(3)(1981) (subsequently withdrawn in 1983).

⁶⁹Treas. Reg. 1.385-7(b) (1981) (subsequently withdrawn in 1983). For a discussion of excessive debt see note 65 supra.

⁷⁰Treas. Reg. 1.385-7(c) (1981) (subsequently withdrawn in 1983).

⁷¹Treas. Reg. 1.385-9(a) (1981) (subsequently withdrawn in 1983).

⁷²Id.

⁵⁵Treas. Reg. 1.385-3(a)(2) (1981) (subsequently withdrawn in 1983).

⁵⁶Treas. Reg. 1.61-12(c) (1988).

⁵⁷Treas. Reg. 1.385-3(b)(2)(1981) (subsequently withdrawn in 1983). For a discussion of the definition of a reasonable interest rate, see note 69 infra.

⁵⁸Treas. Reg. 1.385-3(e) (1981) (subsequently withdrawn in 1983).

⁵⁹Treas. Reg. 1.385-3(e) (1981) (subsequently withdrawn in 1983).

⁶⁰Substantial proportionality was to be determined from all the relevant facts and circumstances, including family or other relationships described in 318(a). See Treas. Reg. 1.385-6(a)(2)(i) (1981) (subsequently withdrawn in 1983).

⁶¹Treas. Reg. 1.385-6 (1981) (subsequently withdrawn in 1983).

⁶²Treas. Reg. 1.385-6(b) (1981) (subsequently withdrawn in 1983).

⁶³Treas. Reg. 1.385-6(d) (1981) (subsequently withdrawn in 1983).

⁶⁴Treas. Reg. 1.385-6(f) (1981) (subsequently withdrawn in 1983). A corporation was considered to have excessive debt if the terms of the instrument and the corporation's financial structure would not be satisfactory to an independent commercial lender. Treas. Reg. 1.385-6(f)(2) (1981) (subsequently withdrawn in 1983). However, the regulations also provided a safe harbor to avoid reclassification. A corporation was never considered to have excessive debt if its overall debt-to-equity ratio was less than or equal to 10-to-1, and if its inside ratio (the debt-toequity ratio calculated after excluding debts to independent creditors) was less than or equal to 3-to-1. Treas. Reg. 1.385-6(f)(3) (1981) (subsequently withdrawn in 1983). Treas. Reg. 1.385-6(g)(1) (1981) (subsequently withdrawn in 1983), (2) defined the debt-to-equity ratio.

⁶⁵Treas. Reg. 1.385-6(j) (1981) (subsequently withdrawn in 1983).

⁶⁶Treas. Reg. 1.385-6(k) (1981) (subsequently withdrawn in 1983).

⁶⁷Treas. Reg. 1.385-6(1) (1981) (subsequently

applicable to its terms and the circumstances of its issue.⁷³

Exceptions to the Regulations

Straight debt instruments issued to completely unrelated parties were unaffected by the regulations. A Similarly, straight debt instruments issued to shareholders, but not issued substantially proportionately to stock, would never be recharacterized as preferred stock. Eurthermore, any instrument registered with the SEC and sold to the public for money was exempt from the regulations. Finally, the rules relating to instruments issued substantially proportionately to stock did not apply to instruments held by independent creditors.

Withdrawal of Treasury Regulations Just three years after these voluminous regulations⁷⁸ were promulgated, they were withdrawn by an embattled Treasury stating that they did not "fully reflect the Treasury or IRS position on debt/equity matters." However, these regulations can still be consulted as a guideline to aid in the classification of an investment interest.

2. Current Case Laws Attempt to Define Debt and Equity

Court decisions attempting to classify an instrument as debt or equity have been aptly referred to as a "jungle"80 and a "viper's tangle."81 "The issue is murky because classification of an obligation as debt or equity traditionally is referred to as a question of fact to be resolved by applying vague standards that require the weighing of many factors."82 As a result, the precedential value of case law in this area is very limited.83 To further complicate the situation, the Service will not issue an advance ruling on the classification of an instrument as debt or equity.84 Hence, courts have spewed forth laundry lists of factors to be considered in classifying all instruments; however, there has never been any indication as to which factors are controlling.85

The principal factors enunciated over the years to discern the economic reality of the transaction are as follows:⁸⁶

- (1) The label applied to the instrument by the parties—the courts and Service are often unwilling to accept the taxpayer's label as controlling:⁸⁷
- (2) The presence or absence of a fixed maturity date—a fixed or ascertainable maturity date is essential to debt classification.⁸⁸ However, standing alone a fixed maturity date does not insure debt classification.⁸⁹ Furthermore, considering the nature of the enterprise, the maturity date must not be too far in the future;⁹⁰
- (3) The source of principal payment—repayment of principal contingent upon future earnings of the corporation is usually classified as an equity feature;⁹¹
- (4) The right to enforce payments of principal and interest—on default creditors have the right to sue for the amount owing or, if necessary, to force the debtor into bankruptcy. However, dissatisfied shareholders may only vote out the current Board of Directors;⁹²
- (5) Participation in management flowing as a result—managerial or

- voting rights are an indicia of equity status, but are usually only a marginal factor in the classification of an interest because it is not unusual for a loan arrangement to impose restrictions on certain financial matters of the corporation;⁹³
- (6) The status of the contribution relative to other corporate creditors—subordination to the claims of general creditors is indicative of equity investment.⁹⁴ However, if the disputed instrument still ranks ahead of common and preferred stock it is not automatically denied debt status;⁹⁵
- (7) The intent of the parties—intent is measured by objective criteria such as lender's reasonable expectation of repayment, corporation's debt-to-equity ratio and whether an outside investor would have made a loan on similar terms. The real question is whether the loan was so risky as to constitute venture capital;⁹⁶
- (8) Whether capitalization is "thin" or adequate—thin capitalization occurs when a corporation is financed with an excessive debt structure and is an indicia of equity; however, a high debt-to-equity ratio may not always be fatal to debt classification;⁹⁷
- (9) The identity of interest between creditor and shareholder—if a debt instrument is convertible and conversion is virtually certain, if purported debt is excessive when compared against assets from which it can be satisfied, or if debt is held by shareholders pro rata to their holdings of the corporation's stock than a debt instru

⁷³Treas. Reg. 1.385-10(a) (1981) (subsequently withdrawn in 1983).

⁷⁴Treas. Reg. 1.385-3 (1981) (subsequently withdrawn in 1983).

⁷⁵See 1d. and Treas. Reg. 1.385-6 (1981) (subsequently withdrawn in 1983).

⁷⁶Treas. Reg. 1,385-3(b)(2)(ii) (1981) (subsequently withdrawn in 1983).

⁷⁷Treas, Reg. 1.385-6(a)(ii) (1981) (subsequently withdrawn in 1983).

⁷⁸The regulations were 110 single-spaced pages which only the brightest of America's lawyers could understand. Manning, Hyperlexis and the Law of Conversation of Ambiguity:Thoughts on Section 385, 36 Tax Lawyer 9, 15 (1982).

⁷⁹⁴⁸ Fed. Reg. 31,054 (1983).

⁸⁰Commissioner v. Union Mutual Insurance Co. of Providence, 386 F.2d (974, 978 (1st Cir. 1967).

⁸¹Bittker & Eustice, Federal Income Taxation of Corporations and Shareholders 4.04 (4th ed. 1979)

⁸²Lind, Fundamentals of Corporate Taxation: Cases and Materials, at 105.

⁸³See generally, Plumb, The Federal Income Tax Significance of Corporate Debt:A Critical Analysis and a Proposal, 26 Tax L. Rev. 369, 407-10 and note 21 (1971).

⁸⁴Rev. Proc. 87-3,4.02(1), 1987-11RB 27.

⁸⁶ For an exhaustive list of 38 factors used by courts to decide this issue, see Holtzman, "The Interest Dividend Guidelines," 47 Taxes—The Tax Magazine 4 (1969).

⁸⁷See Plumb, The Federal Income Tax Significance of Corporate Debt: A Critical Analysis and a Proposal, 26 Tax L. Rev. 369, 447 (1971).

⁸⁸ See Wood Preserving Corp. v. United States, 347 F.2d 117, 119 (4th Cir. 1965).

⁸⁹Id.

⁹⁰See Plumb, supra note 87 at 415-16.

⁹¹IRS Letter Ruling 8523009.

⁹²Campbell & Lynn, Creditor's Rights Handbook (Clark Boardman Co. 1985).

⁹³See Plumb, The Federal Income Tax Significance of Corporate Debt: A Critical Analysis and a Proposal, 26 Tax L. Rev. 369, 447 (1971).

⁹⁴Id. at 442.

⁹⁵**I**d.

⁹⁶Gilbert v. Commissioner, 248 F.2d 399 (2d Cir. 1957).

⁹⁷Bradshaw v. United States, 683 F.2d 365 (Ct. Cl. 1982). It is usually assumed that a deb-to-equity ratio that does not exceed 3-to-1 will withstand attack. Plumb, supra note 93 at 507-19.

ment is likely to be reclassified as equity because there is no difference between the interests of shareholders and creditors;⁹⁸

- (10) The source of interest payments—if purported interest is payable only from such amounts as are left after replenishment of the corporation's working capital or replenishment for contingencies, the instruments resemble stock as opposed to debt. Furthermore, failure to provide for interest is usually fatal for debt classification;⁹⁹
- (11) The ability of the corporation to obtain loans from outside lending institutions—if outside lenders would not make a loan on similar terms so that the corporation is forced to borrow from shareholders, the instrument looks more like a contribution to capital; 100
- (12) The extent of the funds used to acquire capital assets—debt issued by shareholders to acquire core assets of the business is in reality equity;¹⁰¹ and
- (13) The failure of the debtor to repay on the due date or to seek a postponement—if the corporation consistently fails to pay interest or repay debts when they become due, its claim to debtor status may be defeated.¹⁰²

Similar to the application of Treas. Reg. 1.385-5 (1981), the various factors are then classified as either debt or equity features and tallied and whichever classification predominates controls for tax purposes. 103 For example, in Texas Farm Bureau, 104 the Fifth Circuit Court of Appeals applied this 13 factor laundry list to cash advances made by one nonprofit corporation to another nonprofit corporation. It found that only three factors pointed weakly to debt classification: (1) that the advances were called notes, (2) that there was a stated maturity date, even though it was not adhered to, and (3) that there was identity of interest between creditor and shareholder. The remaining ten factors were all judged to be on the equity side of the ledger, thus the case advances were reclassified from debt to equity.

"This is one of those areas of the tax law where the virtues of vagueness exceed its vices; that the courts must look to all the facts and circumstances of each case to see what is really 'intended' or what has 'substantial economic reality;' and that it is salutary to tell taxpayers only that there is a danger zone which they enter at their peril."

debt characteristics as most pervasive in its classification: (1) the lack of subordination of the share accounts to general creditors, (2) the fact that the share accounts could be withdrawn after one year was evidence they were not permanent contributions to capital, (3) the essentially risk free nature of the investments and the fact that the dividends received were equal to the prevailing interest rates on savings accounts, and (4) that the debt value of

the shares was equal to their face amount, indicating that the equity features had no incremental value. Hence, the debt features outweighed the equity features and the instruments were properly classified as debt.

Conclusion

While classification of debt versus equity is devoid of black letter law, the issue remains extremely important, for as discussed earlier,106 reclassification could result in severe tax consequences. The former treasury regulations and the factor analysis enunciated in recent case law provide the only guidelines for classification of an investment interest. In fact many of the principles articulated in the former regulations, such as pro rata holding of stock and debt and excessive debt-to-equity ratio, were consequently adopted as elements to be considered in the factor analysis. However, there are no bright line tests or safe harbors and merely abiding by the former treasury regulations or citing cases applying the factor analysis on similar facts does not assure classification. Hence, this area of tax law continues to be one of the most complex and difficult to understand. When confronted with the issue of the proper classification of an investment interest as either debt or equity, it is helpful to consult the regulations to see how they would have handled the situation, research recent case law and conduct a factor analysis to determine how a court might classify such an interest. and most importantly to understand

this is one of those areas of the tax law where the virtues of vagueness exceed its vices; that the courts must look to all the facts and circumstances of each case to see what is really "intended" or what has "substantial economic reality"; and that it is salutary to tell taxpayers only that there is a danger zone which they enter at their peril.¹⁰⁷

Similarly, the United States Supreme Court in *Paulson v. Commissioner*, ¹⁰⁵ classified share accounts in a savings and loan as debt by applying the factor analysis, evaluating each characteristic separately to determine if they were more debt or equity. The Court appeared to deemphasize many traditional features such as, existence of dividends on the share accounts and voting rights, and cited the following

⁹⁸See Rev. Rul. 83-98, 1983-2 C.B. 40 and Brountas v. Commissioner, 692 F.2d 152 (1st Cir.

 ⁹⁹National Carbide Corp. v. Commissioner,
 336 U.S. 442, 435 n.16 (1949).

¹⁰⁰Towne Square, Inc., 83, 010 P-H Memo. T.C. (1983).

¹⁰¹Schnitzer v. Commissioner, 13 T.C. 43 (1949).

¹⁰²Slappy Drive Industrial Park v. United States, 561 F.2d 572, 582 (5th Cir. 1977).

¹⁰³See Texas Farm Bureau v. United States, 725 F.2d 307 (5th Cir. 1984).

¹⁰⁴ I d

¹⁰⁵⁴⁶⁹ U.S. 131 (1985).

¹⁰⁶See notes 9-36 and accompanying text for a discussion of the significant tax consequences of classifying an interest as debt or equity.

¹⁰⁷Lyon, Federal Income Taxation, Surv. Am. L. 123, 142 annot. (1957).

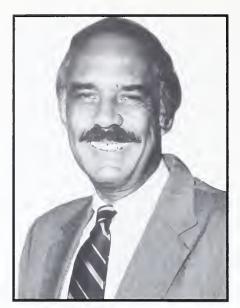
Hooding Ceremony

Editor's note: Robert M. Duncan, a partner with Jones, Day, Reavis & Pogue, delivered the following address at the Law School Hooding Ceremony on May 14, 1989.

I congratulate each of you who today will become a graduate of this outstanding Law School. This graduation ceremony celebrates a turning point in your life. It is a rite of passage which entitles you to a new important standing in our society. We welcome you and delight in sharing your joy of success. Today is both a day of celebration and a fitting occasion for each of you to examine the course of your lives. Unfortunately, it is also a traditional time for graduation speakers to test one final time the patience instilled by untold numbers of lectures of more than 50 minutes duration. I shall endeavor not overstay your very kind welcome.

First, let me take the liberty to speak on behalf of all of today's graduates, and to thank all of you who have given inspiration, time, guidance, patience, instruction, love and money. Nobody, goes anywhere in today's world without a lot of help.

It is a very special honor for me to have been invited to make today's remarks. Special in the sense that I am well aware of the excellence of this Law School, having had a number of your distinguished graduates in Courts where I have worked. Special—in that I have had a chance to visit with your faculty and visit with General Taylor, an old friend (who always does an excellent job of advocating the wonders of Wake Forest Law School). In addition, I know of the exciting plans for the new Law and Management building. Accordingly, you honor Shirley and me by asking us to be with you today. (This is a glorious time of the year to be in Winston-Salem.)



Robert M. Duncan

I would like to briefly comment on three basic themes:

Introspection Commitment Renaissance

While preparing these remarks, I was reminded of a story told about the late Robert Benchley, well-known drama critic, editor of the Harvard Lampoon, and a member of the famed New York City Algonquin Roundtable. While a student at Harvard, Benchley came across a final examination question that read:

"Discuss the arbitration of the international fisheries problem given above in respect to hatcheries protocol and trawling procedures as it affects:

- (a) The point of view of the United States;
- (b) The point of view of Great Britain.

Benchley answered with a mixture of directness and evasion, saying:

I know nothing about the point of view of Great Britain in the arbitration of international fisheries disputes, and nothing about the point of view of the United States; therefore, I shall discuss the question from the point of view of the fish."

From that perspective, you are forewarned that we will be swimming upstream for a while this afternoon.

Introspection

At a point when Socrates was facing his own death by drinking hemlock, an act required by his fellow Athenians for troubling them with his incessant inquiring into the nature of virtues, he said—an unexamined life is not worth living.

Today is an appropriate day for introspection, the consideration of one's own internal state of feelings and attitudes. Now, rest assured that this will not be didactic, and you will not have a quiz when I conclude.

Crossing the threshold into the legal profession is intimidating. As a Black American in College and Law School in the late 40s and early 50s, I entertained serious doubts about my future in the profession. Many opportunities open to many of my classmates were not available to me. In addition, my knowledge of what lawyers actually did was so sparse that I was somewhat defeated by the feeling that I did not really believe that I could do whatever it is that they do. I know that my early painful years of anguish were disadvantageous. Wake Forest has a long tradition of excellence. I can say without equivocation, you are well prepared to take on the opportunity to pursue any sort of legal endeavor. With effort and experience you will be able to draft a multi-million dollar contract, object at the right time in court, defend a homicide case, represent a company in a hostile takeover, be a judge, argue a case before the U.S. Supreme Court, or become a law professor. In addition, with effort, you soon will satisfy that procedural requirement called the bar examination. Don't waste valuable time and energy on self-doubts. If you have any doubts, today is a good day to purge them from your mind.

An enlightened contemporary philosopher—Magic Johnson of the Los Angeles Lakers, was asked, last year about this time, which team would he rather play against, the Detroit Pistons or the Boston Celtics. He said, "that's easy—the Celtics—because in order to win, they make us do things we didn't know we could do." Similarly, I believe that each of you can do things that you don't believe you can do.

A self-examination of your personal adjustment is critical. Why so? Well,

almost everything in this profession has to do with interpersonal relations. The image of a lawyer off in the corner doing green eyeshade legal research day in and day out—is something of a myth. I believe you have to ask yourself questions such as these:

How well do you get on with people? How good is your word? Can you be depended on to be at the right place at the right time? Are you willing to help people and expect nothing in return? How well can you react to a win? Can you be tough—but not nasty? Can you take criticism? Can you take a loss without being angry with the whole world? Can you handle your ego (we lawyers tend to get seized with our own pomposity); but also be able to demonstrate self-confidence?

I hope that you maintain a sense of perspective, about not getting so caught up in a sense of self-importance, as you surge through your profession, that you lose sight of who you are—a human being with about as many good traits as the rest of the human beings in the world.

Finally, don't connect your self-worth to your income.

Today, look at the person next to you; he or she may be the judge whom 5, 10, or 15 years from now you will ask to approve a 2 million dollar fee. It won't hurt for you to be remembered as a most decent and honorable person, rather than a jerk.

Commitment

Your graduation from Law School marks your entry into public service—your completion of law studies testifies that you have achieved a level of competence. Now the question arises concerning the nature of the commitment necessary to perform that public service as officers of the Court.

Intellectual pursuit of the law is for the benefit of others—for the benefit of the individuals and organizations you counsel. As you all well know, the lawyer has a fiduciary duty to clients. That duty is not at all complex. It simply involves the duty of loyalty and the duty of care.

As Dr. Willard Boyd former President and former Law School Dean at the University of Iowa remarked:

"The duty of loyalty requires you to place the interests of your client ahead of your own. The duty of care requires you to be dependable and conscientious in handling your client's affairs. You must be both intellectually competent and ethically responsible in serving your clients."

Next, I urge you to sharpen your sensitivity to the fact that the legal profession is not risk-free.

"An enlightened contemporary philosopher— Magic Johnson of the Los Angeles Lakers, was asked, last year about this time which team would he rather play against, the Detroit Pistons or the Boston Celtics. He said, 'that's easy — the Celtics because in order to win, they make us do things we didn't know we could do.' Similarly, I believe that each of you can do things that you don't believe you can do."

Prof. Earl Murphy at our Law School in Columbus notes:

"Lawyers shape the subject-matter of our quarrels. In so doing, lawyers also become lightning rods for the occasional bolt of public electricity; nor should lawyers rationally expect their roles to be risk-free."

It can be a scary endeavor. I still can't sleep the night before an argument. Some fear is healthy, but it must not deaden your alacrity to strongly advocate what you believe in. The best

lawyers and judges I know are prepared to take well studied risks.

I was away from the private practice of law on the bench for almost 20 years. During the past four years in practice my greatest disappointment has been what I perceived to be a substantial diminution in "professionalism." A lack of a spirit of public service and a lack of civility, common courtesy and decent manners among adversaries. Letters and briefs are laced with strident comments. Many lawyers engage in leveraging and juxtaposing activity that may not be deemed unethical-but certainly—pounding at the boundaries of the codified ethical constraints. In my view, the solution to all future professionalism concerns is simple dedicate yourself to practice your profession in a manner which exceeds the minimum requirements stated in the Code of Professional Responsibility or permitted by pronouncements of the Courts.

In sum, I urge you not to forget to make a commitment to public service, ethical standards, and professionalism. The commitment cannot be casual—it must be firm and unbending.

I have a friend who is a very active T.V. motivational speaker. (He tells you how to make a million dollars by selling the same real estate over and over again). In any event, he is right when he says:

"If you go through life casually, you will be a casualty."

Renaissance

I love to read about the Renaissance. A time in our world's history when fragile notions of enriching life and delighting mankind through art forms emerged in contrast to medievil art aimed at interpreting life and religiously elevating mankind. The spirit of Renaissance connected cultural splendor with a new notion of social freedom, a new emphasis on the individual.

No where on earth was the melding of positive social accommodation and cultural enrichment more socially profitable than in England during the reign of Queen Elizabeth. Immediately before the accession of this tall majestic 25 year old woman to the throne, the country was afflicted with the horrors of civil war, and religious antagonisms

seemed irreconcilable. The budget was in a hopeless state, and foreign affairs as well. Somehow her leadership brought peace between the classes. She successfully promoted the capitalist economy; new manufacturing industries arose; Sir Francis Drake and Sir Walter Raleigh explored. International trade increased. The economy became healthy.

While one must not over-estimate any notions of substantial social class mobility in Elizabethan England; however, restoring order between the classes was amazing progress.

The English theatre thrived. Shakespeare, the master of the euphemism, playful romanticism and tragedy dramatized the political and social structure of the period.

The combination of art, culture, and social progress during the Renaissance was remarkable social interaction. Each having dynamic influence on the other.

Why am I talking about the Renaissance? What on earth does this have to do with lawyers?

When thinking of the array of problems facing Queen Elizabeth, I reflect on current problems:our puzzling global economic future, our aging and inadequate urban infrastructure, a burgeoning "underclass" which is black, Hispanic, Asian, and white characterized by almost all sorts of pathological

or disadvantageous conditions. America is changing, particularly in the composition of its young. Blacks and Hispanics are now 25 percent of our school children; by the year 2000, they will be 47 percent. In the year 2000, 85 percent of the new entrants to the nation's workforce will be members of minority groups and women. This will be a dramatic new social configuration.

After years of horrible social inertia, we should be proud that, in the last 35 years, we have made excellent and substantial progress toward the achievement of racial equality. On the other hand, recent accounts of overtly manifested race hate generated by organized groups (even on our college campuses) serves to remind us that we have a long way to go.

In a word, these are problems that call for Renaissance.

Today, there are more lawyers in the United States than ever before. We affect, in some fashion, the entire panorama of social and economic organization. If society does not work efficiently there is going to be more blame, than ever before, to put on lawyers.

After a rather lively exchange between Socrates and one of his students, the master said, "Theaetetus, you think a lot." And Theaetetus replies, "No, I wonder a lot." Theaetetus, probably did not get good grades. But I believe wondering is needed; I wonder a lot.

Today, I wonder whether you can promote a kind of modern Renaissance which will:

- (1) Provide outstanding leadership;
- (2) Maintain an active interest in cultural enrichment;
- (3) Heighten concern for ethical standards; civility and basic justice;
- (4) Reduce poverty; improve education and health care;
- (5) Continue to struggle to completely break with a racist past;
- (6) Ensure that we grow stronger as we accommodate dramatic demographic change;
- (7) Make sure that America remains both economically and militarily the greatest nation on earth.

Although I firmly believe your generation can do it, maybe a big new Renaissance is too much to ask for. On the other hand; there is no reason that you, all of us here, and others cannot bring about a lot of small Renaissances—in your particular community, in your neighborhood, with your family and in your Bar Association.

Graduates of the class of 89, this Law School is better because you were here.

Thank you for listening to me.



Russ Becker, Jennifer Baucom, Mike Bennett, and David "Catfish" Bender.



John Fritsche, Becky Fry, Dain Dulaney, and Judd Hartman.



Recent newlyweds and graduates: Jim Bryan and Tomi White Bryan.



Byron Waters with his son Louis.

Congratulations!!



Robin Luffman, DeAnna Leeper, and Roy Marshall.



Rob Maloney, Jeff Evans, Becky Garvin, Bill Toole, and Charles Greene.

1989 Graduates

Virginia Abdella-Conley	Parkersburg, WV
Milton Reid Acree, Jr.	Salem, VA
John Christopher Allen, IV	Lisle, II
Gilbert Julian Andia, Jr.	West Islip, NY
Michael E. Archenbronn	Jacksonville, FI
Joe Elem Austin, Jr.	Monroe, NO
Mary Caroline Avera	Murrells Inlet, SC
Mark D. Barth	Itasca, II
James Howard Batts, Jr.	Kinston, NO
Jennifer Joan Baucom	Charlotte, NO
Russell R. Becker	Pfafftown, NC
David Michael Bender	Charlotte, NO
Michael Reece Bennett	King, NO
Paul Henry Billow	Hickory, NO
Kenneth M. Borick	Hilton Head Island, SC
Edwin Woodall Bowden	Dallas, TX
Christopher Seely Bowman	Cincinnati, OF
Christin Jarvis Bramlett	Davidson, NO
W. O. Brazil, III	Asheville, NO
Kenneth William Brosnahan	York, PA
James West Bryan	Raleigh, NO
Ralph Laurence Bunch	Winston-Salem, NC
Cheryl Yeaman Capron	Lynchburg, VA
Linda Gail Carpenter	Lake Charles, LA
Stephen Domenic Celestini	Winston-Salem, NO
David N. Chambers	Iowa City, IA
Tamula Ellen Childress	Morganton, NO
Joy Ammons Ciriano	Fayetteville, NO
Adair Gillam Clarke	Lynchburg, VA
Christopher McLauchlin Collier	Statesville, NO
Keenan Michael Conder	Charlotte, NO
Stephen Douglas Dellinger	Charlotte, NO
Thomas Joseph Doughton	Winston-Salem, NO
Joseph Daingerfield Dulaney, Jr.	Charlotte, NO
Jeffrey Sanford Evans	Waynesboro, PA
Lucy Willingham Everett	Goldsboro, NO
Christopher M. Feldenzer	Trenton, N.
Karen Kirsten Fisher	Nashville, NO
Brian Marc Freedman	Alexandria, VA
Susan Lloyd Frier	Hendersonville, NO
John Moncure Fritsche	Fairfax, VA
Rebecca Ruth Fry	Lewistown, M7
Sarah John Fullenwider	Southern Pines, NO
Rebecca Gaillard Garvin	Boca Raton, FI
Andrew James Gerber	Columbus, OF
Bobbi Acord Gomez	Charleston, WV
Mark Andrew Gomez	Charleston, WV
Charles Leon Greene	High Point, NO
John Daniel Greene	Statesville, NO
Kimberly Dawn Greene	Oxford, NO
Elizabeth Glover Grimes	Winston-Salem, NO
J. Erik Groves	Charlotte, NO
Dale Edward Gunter	Pocomoke City, MI
Vicki Lyn Harden	Tulsa, Ok
Edwin Mitchell Hardy	Bath, NO
Jeffrey Brian Harrison	Advance, NO
Shannon Bell Hart	Floydada, TX
Brainard Judd Hartman	Charleston, WV
Christine Brock Harvey	Rochester, PA

Bradley Jerone Herring
Robert Jack Higdon, Jr.
Sharon Kay Hilborn
Dean Wilbert Hollandsworth
George Elliott Hollodick
8
Steven Earl Hollowell
Gregory Scott Humphrey
Robert Howard Humphries
James Preston Hutcherson
James Otis lcenhour
Stephen James Jeffries
Karen Rae Johannes
Scott Norris Johnson
Arnold Ogden Jones, ll
Michael G. Knox
Scott Edward Lawrence
DeAnna Rhea Leeper
S. Matthew Lilly, Jr.
Jeffrey Adam Loew
Billy Irvin Long, Jr.
Todd Long
Robin R. Luffman
Robert Emmett Maloney, Jr.
Raymond Maurice Marshall
-
Lucy Richmond McCarl
Elizabeth B. McGee
J. Reid McGraw, Jr.
Marie Kathleen McKinney-Weldon
Joseph Stanley Mekonis
Scott Bryan Miller
Michael William Mitchell
Victoria Lyn Mitchell
Kevin Francis Morin
Sandra Lee Newbury
Kenny Bill Newman
Laura Swisher Nye
Katherine Ann O'Connor
Osman Syed Omer
Robert Harrison Owen, Ill
Joon Kook Park
Kimberly Anne Payne
Lucia C. Peel
James McRae Perry
-
Michael K. Phillips
Damon Verner Pike
Jonathan Gregory Poole
Nancy P. Quinn
Robert Hugh Raisbeck, Jr.
Eric M. Reeves
David Allen Rhoades
Neal Dewitt Rhoades
Robert Bruce Richbourg
Beth Marie Rickabaugh
Robert Eric Ruegger
Christine Marion Ryan
Sheila M. Ryan
Regine Susanne Sack
Edward Kieran Shanley
-
Deborah Duncan Sheikh
Anuraag Hari Singhal
William Robert Slicer
Lucretia D. Smith

Wilson, NC
Asheville, NC
Frankfort, KY
Greensboro, NC
Winston-Salem, NC
Bayboro, NC
Mocksville, NC
Winston-Salem, NC
Durham, NC
Bethesda, MD
San Diego, CA
Smithfield, NC
Goldsboro, NC
Charlotte, NC
Greensboro, NC
Johnson City, TN
Marion, VA
Binghamton, NY
Pfafftown, NC
Arlington, VA
Elkin, NC
West Haven, CT
Clairton, PA
Lenoir, NC
New Orlean, LA
Charlotte, NC
Jacksonville, FL
Bridgeville, PA
Winter Park, FL
Raleigh, NC
Morehead City, NC
Wilton, CT
Waukesha, WI
Springfield, MO
Greensboro, NC
Dover, DE
Morganton, NC
Asheville, NC
Seoul, Korea
Skipperville, AL
Raleigh, NC
Winston-Salem, NC
North Benton, OH
Vienna, VA
Kinston, NC
Jacksonville, FL
Laurel, MD
Dallas, TX
Winston-Salem, NC
Kernersville, NC
Nashville, GA
Morganton, NC
Raleigh, NC
Bethpage, NY
Branford, CT
Charlotte, NC
Attleboro, MA
Durham, NC
Houston, TX
Charleston, WV
Gate City, VA
Bethel, OH
Charlotte, NC
St. Joseph, MO

Keith Paul Spiller Charles Richard Splawn Douglas R. Sprong

Daniel M. Sroka	Milwaukee, WI	Martin Anderson Whitt	Winston-Salem, NC
Colleen Wynne Stolgitis	Hopkinton, RI	Thomas Dee Wight	Roosevelt, UT
Iris Anne Sunshine	Somers, NY	Roderick Harrison Willcox, Jr.	Columbus, OH
Anthony Alan Tansimore	Culpeper, VA	Paul Edwin Williamson	Asheville, NC
Stuart Lamar Teeter	Winston-Salem, NC	Ranlet Shelden Willingham	Winston-Salem, NC
Franklin Scott Templeton	Boone, NC	e	· · · · · · · · · · · · · · · · · · ·
Daniel Alan Terry	Charlotte, NC	Lanny Thomas Wilson	Wilmington, NC
Emerson McLean Thompson, III	Elizabeth City, NC	Samuel Bayness Winthrop	Statesville, NC
• •	• /	Mark J. Wittman	Marshfield, WI
William Walter Toole	Winston-Salem, NC		· · · · · · · · · · · · · · · · · · ·
Thomas Morgan Van Camp	Lewisville, NC	Brent Earl Wood	Roanoke Rapids, NC
Byron Ward Waters	Chesapeake, VA	Charlot F. Wood	Yadkinville, NC
Tomi Jane White	Raleigh, NC	Stephen Alan Woodson	Louisville, KY

Conferred December, 1988

Susan Alicia E. Aiken	Meadville, PA	Joseph Allison Hayworth, Jr.	High Point, NC
Jill Adelia Bryan	Pittsboro, NC	Ross Edwin Jeffries, Jr.	Roanoke, VA
Lee Winfred Gavin	Asheboro, NC	Corwin Moore Metcalf	Greensboro, NC
Carole Gordon Gillio	New Orleans, LA	Karla Judi Smith	Detroit, MI
Susan Hayes	Greensboro, NC	Torrey Salve Tellefsen	Morganton, NC

Conferred August 9, 1988

Celia Evelyn Hemphill

Winston-Salem, NC

Oath

Oath taken by the Candidates for the Juris Doctor Degree at the Wake Forest University School of Law Hooding Ceremony.

I DO SOLEMNLY SWEAR THAT UPON BEING DULY LICENSED TO PRACTICE THE PROFESSION OF LAW:

I will support the Constitution of the United States;

I will maintain the respect due to Courts of Justice and judicial officers;

I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will not seek to mislead the Judge or jury by any artifice or false statement;

I will maintain the confidences of my client, and will accept no compensation in connection with the transaction except with the client's approval;

I will advance no fact harmful to the honor or reputation of a party or witness, unless required by the justice of the cause which I am charged;

I will not reject for personal reasons, the cause of the defenseless or oppressed, or delay any person's cause for personal gain or malice, SO HELP ME GOD.

Class Notes

1940

Beamer H. Barnes retired this year from his general civil law practice in Lexington, NC. He stays busy as solicitor of the Davidson County Court, chairman of the Davidson County Democratic Executive Committee and captain in the National Guard. Barnes is quite active at the First Baptist Church, when he's not traveling and motorcycling.

1951

W. Allen Knott retired February 1 after 35 years with the Trust Department of First Citizens Bank & Trust, Co. in Raleigh, NC. He will continue to serve on the Trust Committee and as a consultant to the company's Trust Department.

1953

E.J. Tenney II is practicing law with his son in Claremont, NH. The firm is Tenney & Tenney. He retired in 1986 after 16 years as Sullivan County attorney. He is currently president of the Sullivan County Bar, chairman of the school board, and a police commissioner. He says full retirement will come on December 31, 1990 and has bought a retirement home in Punta Gorda, FL, to prove it.

1963

Fred G. Morrison Jr., completed the Advanced Evidence course at The National Judicial College last fall. He is an administrative law judge with the N.C. Office of Administrative Hearings in Raleigh. Morrison plans to attend the Law, Ethics & Justice course at the college in July.

1964

Douglas P. Connor has a general practice in Mt. Olive, NC. He is president of the Mt. Olive Area Chamber of Commerce. Connor says that his son is in Thailand as a water and soil conservation specialist with the Peace Corps.

Sidney S. Eagles Jr., a judge on the North Carolina Court of Appeals, was recently honored by the Raleigh Kiwanis Club as the Outstanding Kiwanian of the Year.

1969

Carl L. Tilghman is in solo practice in Beaufort, NC. He is chairman of the Carteret County Commissioners.

1970

Col. Roscoe Lindsay Jr. has been selected commander of the 30th Infantry Brigade, which is stationed in Clinton, NC. Lindsay has been nominated for promotion to brigadier general.

1973

James R. Foley is president-elect of Alabama Attorneys for Animals, Inc., a group of 41 lawyers interested in animal cruelty and animal rights matters as seen through the eyes of the law. He has a general law practice in Huntsville.

1975

James Bailey is practicing general law in Wilmington, DE, with emphasis on insurance defense and corporate law. He was an assistant attorney general for two and one-half years.

Bailey is director of the State Division of Business Administration and director of the State Division of Planning. He says he has a "growing firm" of four lawyers and would like to hear from classmates.

M. Douglas Goines has opened a general practice in Morehead City, NC.

1976

David K. Haynes has a general practice in McKinney, TX, and is board certified in criminal law through the Texas Board of Legal Specialization.

L. Elizabeth Henry has been elected partner with Petree Stockton & Robinson. Henry specializes in business and commercial law and is based in the Charlotte office.

1977

James T. Blake and Patricia Reeves Blake are practicing law in Detroit, MI. James is a partner at Dykema, Gossett and Patricia is chief of the appellate division in the U.S. Attorney's Office. Their second child was due in May.

Manes Mernt recently became chairman of the employee benefits department of Marks, Muruse & White in New York, NY.

Betsy Warren Wilson is an assistant professor of business law and real estate at Memphis State University in Memphis, TN. She and her husband. Paul, have three children, including a daughter born in May, 1988.

Kenneth H. Zezulka was recently promoted to vice president with a real estate investment group in hotels, commercial property, and retail shopping centers in New Orleans, LA.

1978

David L. Craven has been promoted to senior vice president and general counsel of Planters Bank in Rocky Mount, NC.

Randall W. Lee has joined the law firm of Kennedy, Covington, Lobdell & Hickman in Charlotte.

Richard Townsend was appointed by Governor James Martin and recently sworn in as district attorney for Robeson County, NC.

Governor Martin has appointed J. Randolph Ward to the N.C. Industrial Commission. Ward practices law in Durham and is on the board of directors of the Durham County Bar Association. He will serve on the commission until 1991.

1979

Ann Heffelfinger Barnhill is a partner with Williamson, Herrin, Barnhill & Savage in Greenville, NC. She practices domestic and real estate law. Barnhill and her husband, John, had a second child last year.

Michael Colliflower has been appointed vice president, general counsel and secretary with Lamar Life Insurance Company in Jackson, MS. He was formerly associate counsel with Jefferson-Pilot Life Insurance Company.

Robert Collins has a national products liability practice with Faegre & Benson in Minneapolis, MN. He and his wife had a son in November.

Howard W. Paschal Jr., has served as State Chairman of the Criminal Law Committee of the South Carolina Trial Lawyers Association since 1987. He has a civil and commercial litigation practice in Greenville. His daughter, Hogan, was born July 20, 1988.

Ralph F. Tellefsen III is a solo practitioner in Elmhurst, IL. His emphasis is on real property, wills, trusts, and divorce. Recently he added a second office in Wheaton. Ralph sends a big "hello" to Tommy, Lee, Stew, Bruce, Bill, and "all the rest of my classmates!"

1980

Karen A. Raschke is a lobbyist in the Virginia General Assembly on behalf of Virginia Electric and Power Co. (VEPCO); has served on the Executive Committee of the Metropolitan Richmond Womens' Bar Association since 1983; has served on the Board of the North Richmond YMCA since 1984: received a Certificate of Achievement from the Virginia State Bar for her work in producing a spouse abuse pamphlet; has been married to Don Creach, an employment lawyer with Hunton & Williams, since 1985; and will serve on the Law Alumni Council from 1989-1993.

Karen Britt Peeler and husband, Michael, announce the birth of their second child, Katherine Britt Peeler, born February 27, 1989. Karen is claims counsel for Lawyers Mutual Liability Insurance Company of North Carolina.

Douglas R. Powell practices civil litigation in Atlanta. Last fall he became Of Counsel with McGee & Oxford.

Jerry A. Wolfe has a solo practice in Bristol, VA. He is director of paralegal studies at Bristol University and last year, was elected to the Bristol City Council.

1981

John Elam is a partner with Hunter, Hodgman, Cooke, Elam & Gordon in Greensboro, NC. He practices personal injury and civil litigation. Elam and his wife, Sandy, had a daughter last fall.

Carol S. Hebert is an attorneyadvisor with the Department of Justice, Office of Information & Privacy in Washington, DC.

Marshall Hurley married Deborah Banks on February 18. He practices civil litigation with Patton, Boggs & Blow in Greensboro, NC. Hurley was legislative director and administrative assistant to U.S. Rep. Howard Coble from 1985-88.

Richard O. Kopf is the co-founder of Decker, Hardt, Kopf, Harr, Munsch & Dinan in Dallas, TX, a firm which has grown from 6 to 25 attorneys in four years. Richard practices real estate and finance law. His second child, Kevin Richard, was born March 14.

Keith C. Martin is a partner with Walsh, Colucci, Stackhouse, Emrich & Lubeley in Arlington, VA. He emphasizes zoning and land use law in Fairfax County and was the 1989 recipient of the Virginia Kentner Award. Martin and his wife, Kathleen, are expecting a child in August.

1982

George H. Yates has opened a law practice in Virginia Beach, VA, after serving as the assistant commonwealth's attorney for the City of Virginia Beach.

1983

R. Gregg Edwards recently started a general litigation practice in Fayetteville, NC. He was formerly with Banks and Edwards.

Cheryl E. Light has joined Morton, Lewis, King & Krieg as an associate. The firm's offices are in Knoxville, TN.

Mary Eloise McCain married Andrew R. Hassell in April. McCain is an assistant public defender for the 18th Judicial District in Greensboro, NC. Her husband is with Henson, Henson, Bayliss and Teague.

1984

Laura Carlan is an attorney with the U.S. Air Force at Offutt Air Force Base in Nebraska. She is a military prosecutor and is chief of environmental law.

Jane Charlton had her first child last August. She litigates in Pittsburgh, PA, with Thomson, Rhodes & Cowie.

Robert Ford recently became partner with Tuggle, Duggins, Meschan & Elrod in Greensboro, NC. He specializes in medical malpractice defense litigation.

Philip J. Passanante has joined Smith, Don, Alampi, Scalo & D'Argenio in Fort Lee, NJ. He specializes in public utilities and communications law.

David M. Warren was appointed to the panel of Chapter 7 trustees for the eastern district of North Carolina. He practices commercial and bankruptcy law in Rocky Mount.

1985

Robert M. Barrett became a partner in January with Holcombe, Bomar, Wynn, Cothran and Gunn in Spartanburg, SC. His emphasis is on insurance defense. Barrett was selected to the 1988-89 Class of Leadership Spartanburg, and is a member of the Spartanburg County Board on Domestic Violence.

J. Anthony Doran had a third son in December. He is an associate with Wray, Layton, Cannon, Parker & Jernigan in Gastonia, NC.

Rhonda S. Kahan practices environmental law with Adams, Dugue & Hazeltin in New York, NY. Her work includes hazardous and toxic waste litigation.

R. Alfred Patrick has joined Anderson, Cox, Collier & Ennis in Wrightsville Beach, NC. He recently left his position as assistant district attorney in the 23rd prosecutorial district to join the firm as a civil litigator.

Kimberly Seman married Dennis M. Gawlik last November in Siena, Italy. She now calls San Francisco, CA, home.

Mary E. Wilson has been named asssociate general counsel with Hoechst Celanese in Charlotte, NC. She gave birth to a daughter in February and is 1989 president of the Eden United Way.

1986

J. Stewart Clontz married Mary Katherine Bunch of Greensboro, NC, on April 1.

Robert A. Lauver has formed a professional association for the practice of law with Clarence R. Lambe Jr. in Kernersville, NC. Lauver's practice involves criminal defense and civil litigation, while Lambe practices mostly real estate law.

Richard H. Moore has been appointed assistant U.S. attorney in Kittrell, NC.

Richard Tarrier of Boone, NC, is a member of the Blue Ridge Area Volunteer Lawyers (BRAVL), and was named the 1988 Volunteer Lawyer of the Year by BRAVL.

1987

Theresa M. Bender became an assistant attorney general last fall in Tallahassee, FL.

Lani Hustace is a criminal defense lawyer with the U.S. Navy stationed in Norfolk, VA. Cases have taken Hustace to Panama, Iceland, and a number of aircraft carriers.

Brent C. Shaffer practices commercial real estate law in Baltimore, MD, with Semmes, Bowen & Semmes. He married Cheryle A. Lamberth in 1987.

1988

Paige B. Dalton and Polly D. Sizemore have joined Nichols, Caffrey, Hill, Evans & Murrelle in Greensboro, NC.

Walker Douglas has joined Douglas Battery Manufacturing Company as in-house corporate counsel in Winston-Salem, NC. He and his wife had a son in December.

Willie Lee Nattiel Jr. is a staff attorney with the Defender Association of Philadelphia, PA.—that city's version of the public defender office. He was recently appointed to the Judicial Merit Selection Committee of the Young Lawyers Section of the Philadelphia Bar Association. Nattiel assures everyone that "I am still alive!"

Keep those cards and letters coming—the *Jurist* likes to hear from you!

WHAT'S NEW? Wake Forest Jurist would like to hear from all alumni about any new developments in your life. Kindly take a few moments to fill out the form below and return it to Wake Forest Jurist. It is self-addressed for your convenience.

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Wake Forest University School of Law 1989 Continuing Legal Education Schedule

Family Law Symposium — 12.0 MCLE Hours (9.0 Practical Skills and 2.0 Ethics)

August 31-September 1 (live) September 7-8 (portions live) September 14-15 (portions live) October 5-6 (portions live) Raleigh Winston-Salem Charlotte Asheville

Quality Inn Mission Valley Hyatt House Radisson Plaza Quality Inn on the Plaza

Ninth Annual Review — 12.0 MCLE Hours (2.0 Ethics)

September 29-30 (live) October 13-14 (live) October 27-28 (live) November 10-11 (live) Raleigh Charlotte Asheville Winston-Salem McKimmon Center Sheraton Airport Plaza Grove Park Inn Benton Convention Center

General Practice Symposium — 12.0 MCLE Hours (10.0 Practical Skills and 2.0 Ethics)

October 19-20 (live) November 2-3 (portions live) December 7-8 (portions live) Raleigh Winston-Salem Charlotte McKimmon Center Hyatt House Radisson Plaza

Registration Fees

\$200.00 general attendance (publication included)

\$170.00 newly licensed (licensed less than 3 years) (publication included)

\$170.00 Second or subsequent lawyer and paralegals (publication included)

Complimentary: Judges (must attend to receive publication)

For those unable to attend, the following publications will be available from the Wake Forest Continuing Legal Education Office:

Professional Responsibility and Ethics Manual with Supplement (\$35.00) Ninth Annual Review Manual (\$85.00) Family Law Manual (Revised Edition 1989) (\$85.00) General Practice Manual (\$85.00) Workers' Compensation Manual (Revised Edition 1989) (\$60.00)

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